BOOK REVIEW

Judicial Contestation: A less Decisive and more Resolute Political System

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Judging Policy.
Courts and Policy Reform in Democratic Brazil
(Taylor, Matthew M. 2008. Stanford: Stanford University Press)

In a context where the amount of cases being processed in the justice system reaches the extraordinary figure of 67.7 million – which is equivalent to one case for every two people over the age of 20 – and where higher court decisions, such as those by Superior Electoral Court (TSE) and the Supreme Federal Court (STF) have directly affected the relationships among the branches of power and redesigned Brazilian polity, the publication of Matthew Taylor's *Judging policy* could not be more opportune. More than that, the well-deserved recognition by the Brazilian Association of Political Science, which awarded him with the "Victor Nunes Leal" prize for best Political Science book (2007-2008), does justice not only to the quality of the work but also reflects the importance achieved by the area of political studies of the Judiciary in the Brazilian political science community.

As the book well highlights, the past 20 years in Brazil's democracy cannot be analyzed without reserving a special place for the role played by Justice institutions. During this time, judges and members of the Public Ministry (MP) have played a decisive role in fulfilling the principles of the 1988 Constitution, in arbitrating the relationships among the branches of power and among the federative entities, in the definition of and adjustments to the main public policies implemented by the various administrations, thus affecting, it could be said, the dynamics of the democratic regime as a whole. The triple transition in the 1980s and 1990s – political regime, State and economic model – was marked by the clash between adverse trends and often by collisions between government policies and constitutional principles. In the various conflicts involving administrations, political parties and civilian

society organized forces, the Judiciary was called upon to intervene. From the notorious plans against inflation in the 1980s to the most recent Growth Acceleration Program (PAC), governmental economic measures have had to undergo thorough judicial reviewing. In a recent recap of PAC works, minister Dilma Roussef, the mind behind the plan, praised the work by the Advocacy General of the Union in reducing what she called the 'risk of judicialization', which has affected mainly land expropriation and environmental impact processes relating to the program.

In fact, we know only the tip of the iceberg in the expansion of justice and the judicialization of conflicts, and still quite superficially. It is remarkable, for instance, how the docket of judgements by the STF throughout 2008 contained themes which were more important to the country than the very recent Congress legislative agenda: in the past year the STF plenary was engaged in discussions and decisions on stem-cell research, the use of wiretapping in police investigations, the extension of the Raposa Serra do Sol Indian reserve in Roraima, terminating anencephalic foetus pregnancies, among other relevant issues. In 2009, the docket is still loaded with extremely important issues. And what shall we say about the political reform carried out through the judicial path in the past few years? A combination of decisions involving the TSE and the STF introduced party loyalty in Brazil, following other judicial interventions in the rules of the political game, such as those which verticalized the electoral coalitions for some time and reduced the number of councilmen in the municipal chambers, as well as the more recent ones, which suspended the political party electoral performance clause and altered the distribution of the party fund.

However, the number of cases and the depth of the changes started by judicial decisions to Brazilian polity still contrast to our meagre knowledge on how the courts in Brazil operate and make decisions. In this sense, *Judging policy* should be greeted as one of the most important recent contributions to overcoming such lack of knowledge.

Matthew Taylor's work is organized in eight chapters, in which he demonstrates the importance of the Judiciary's intervention in policymaking processes in Brazil and seeks to build analysis schemes that enable one to explain, more accurately, the use of the courts by the players authorized to do so. The overall approach is unabashedly institutionalist and based on the premise that "the rules governing access to institutional venues for policy contestation matter significantly to final policy outcomes" (p. 5). But the institutionalism does not take on, here, a narrow perspective, as the author recombines elements from at least three neoinstitutionalist schools – the rational choice one, the sociological one and the historical one – highlighting how the case of Brazil offers a "fascinating perspective" of joint application of these three approaches.

Still in methodological terms, it should be stressed that Taylor openly refuses the adoption of established models in the area of Judicial Politics, such as the attitudinal and

the strategic ones. The author indicates the limits to the application of such models when reviewing the case of Brazil. More than that, given that the courts are passive entities and only act when called upon, it is of less interest to model judges' decisions than to analyze the context and the rules to judicial contestation of policies.

Though the reader is warned that the analysis model in *Judging policy* should not be used in a positivist manner and for predictive purposes, "given the number of component independent variables", it can be said that the author offers us a reasonably precise and rather promising framework from the standpoint of application in comparative analysis. In the model in *Judging policy*, three main factors influence the way public policies are judicially contested: 1) policy salience; 2) political environment and 3) judicial institutional environment.

As for the first factor, Taylor uses the classical analysis by Theodore Lowi to state that "as policy determines politics, so too, policy may determine *judicial* politics" (p. 49). Based on the review of eight specific cases of public policies implemented during the Cardoso administration, the author shows how the costs and benefits of each policy impact the players' decision to contest it judicially and the legal tactics to be chosen by them. The overall conclusion is that policies characterized by costs that are concentrated in specific groups and disperse benefits entail more judicial contestation than other types of policies in which costs and benefits behave otherwise. The notion of "policy salience", as applied to the cases of judicial contestation, can be considered one of the great contributions in *Judging policy.*

The second factor is given less attention in the text, but is still part of the incentives and constraints to which political players are subject. It matters to know that the Brazilian political system – from the detail-oriented 1988 Constitution to the institutional traits of our multipartisan presidentialism and our federative regime – constitutes the battlefield where policy judicialization strategies start making sense and are effectively used by the policy players. In fact, an extremely important point in *Judging policy,* to which the author devotes a chapter and repeated mentions in the conclusion, is the distinction between *veto player* and *veto point*, so dear to institutionalist-oriented literature today.

According to Taylor, it is not correct to analyze the Judiciary and particularly the STF as a *veto player* in the context of the Brazilian political system, be it because the court only acts if called upon or because it is very difficult to see it making a decision in its own right. In the judicial contestation game, veto players would be those actors who are legitimized to call upon the STF by means of Direct Actions of Unconstitutionality (ADINs) but the court itself would be better defined as a veto point. Going further than Tsebelis (1995) (for whom a veto player is a political actor – an individual or collective – whose agreement is required to enact policy change) and adopting Stone Sweet's line, Taylor argues that veto points are "institutional venues that permit political actors to exercise or threaten to

exercise a veto over policy" (p. 76). In these broader terms, addressing the STF as a veto point enables one to show how policy players do not always resort to the court to obtain legal victories, but make use of a set of strategies the author sums up as four 'Ds': *delay, disable* and *discredit* policies or simply to *declare* their opposition. As we are talking about the use of courts with the continuation of the policy by other means, judicial contestation guided by one or more of the four Ds can simply mean an attempt, by the political actor, to oppose the policies adopted by the Executive or the Legislative majority, to engage society, to leverage political negotiations in the course of their implementation or even to garner political weight from groups affected by the measures, but which, for institutional reasons, have not got as much access to the courts. In a nutshell, "by contesting policy in court, it may be possible to secure a political victory without ever achieving a legal victory." (p. 10).

The third factor – Judicial institutional environment – is more complex and was subdivided into three other dimensions by the author: 1) the structure of judicial independence; 2) the structure of judicial review and 3) the administrative performance of the courts. These dimensions, in turn, received even more detailed specifications. Judicial independence is characterized by Taylor based on three aspects: 1) autonomy granted to the Judiciary to take care of its structure and budget; 2) external independence, by the judges, from other branches of government and 3) internal independence, by the lower court judges from their superiors in the judicial hierarchy. The structure of judicial review also depends on three other aspects: 1) constitutional arrangements or the extension of the rights set by the Constitution and the possibility to have concrete jurisdiction over them; 2) the supreme court's scope of juridical power, i.e., whether its decisions can overrule laws prior to their implementation or not, whether judgements incide on concrete cases or on the law in thesis, whether its decisions have *erga omnes* effect and bind the decisions of lower courts, and, lastly, whether judges have discretion to choose which cases they will hear and how; 3) standing, or one of the most highlighted aspects by the author in this dimension of judicial structure: "which actors are legally enfranchised to file what type of suit, regarding what subjects, in what court" (p. 22). Lastly, administrative performance is something that depends on the structure of the judiciary organization, the number of judges and their work conditions, which make a difference in the light of the number of suits brought to the Judiciary. Seen together, these dimensions of the judicial institutional environment enable one to characterize Brazil as an example of high judicial independence, associated with quite a decentralized judicial review structure and one which is broadly accessible by political actors, and which enjoys comprehensive constitutional jurisdiction on citizen's rights and State duties. However, all these remarkable features coexist with precarious administrative performance (they might be part of the cause), marked by the extremely high number of cases, slowness of judgements and low effectiveness of decisions.

Judging policy concentrates its analysis on federal justice and particularly its highest body – The Supreme Federal Court – responsible for judicial review of laws, for the Direct Unconstitutionality Action and/or Extraordinary Appeal instance for suits from lower courts. In line pointed by previous studies, Taylor examines the impact of the expansion, by the 1988 Constitution, of the prerogative to bring judicial review cases in the high court to a select list of organized actors. He also highlights the importance of the *hybrid* setup of our judicial review system – which combines elements from the concentrated European model and diffuse US one – and which makes the STF a *quasi-constitutional* court. And it is important to remember, as does the author, that such direct control of constitutionality by the supreme court was significantly reinforced by the recent Constitutional Amendment 45 (2004), which promoted the Judiciary Reform and introduced mechanisms such as the Binding Precedent and General Repercussion of Extraordinary Appeal, which had been discussed in the juridical and specialist academic circles for years. Associated with a Constitution which constitutionalized a wide array of public policies, such aspects make up quite a favourable picture to judicial contestation by the policy players with rights to file suits with the STF.

Reviewing the ADINs against federal laws in the 1988-2002 period confirmed some hypotheses and rejected others. His main conclusions were that 1) there has been no significance over time, across successive administrations, with regards to the level of granting of injunctions, a result that drives away application of the attitudinal model, given that the "STF has not exhibited any overarching political preferences regarding the occupant of the executive branch." (p. 87); 2) the constitutional controversy set by ADINs reflects much more the conflicts between minorities and majorities in the political system than among branches of government; 3) legal professional groups, such as lawyers, judges and MP members stand a 1.6 better chance of attaining a favourable decision than other actors, especially the Brazilian Bar Association (OAB), responsible for 46% of the actions brought by these professional groups and 5% of the total ADINs in the period; 4) the analysis also found little variation in the granting of injunctions regarding the type of law – ordinary law, complementary, constitutional amendment or provisional measure – contradicting the initial hypothesis that the level of deliberation built into the legal text might make a difference in the STF's considerations on the constitutionality of the laws, but this does not seem to have affected the Court's decisions; 5) plaintiffs have approximately 1 chance out of 5 to see the policy change, with an advantage to state actors and legal groups. But the author highlights that the policy players who make use of ADINs get political benefits from the actions they bring, even if the legal result is not in their favour; 6) though responsible for 1/3 of direct actions, the political parties attain much fewer victories than the OAB, for example.

Two chapters are devoted especially to reviewing the use of ADINs by the Workers'

Party (PT) and by OAB. The comparison between these two types of plaintiffs proved extremely interesting not just from the standpoint of the results obtained, but from the standpoint of the different strategies used by them and the deeper interests which they seem to be going after when they call upon the constitutional court. PT was the party which most resorted to the STF between 1995 and 2002, when they were the opposition in the Cardoso administration. However, only on three occasions was PT successful in disabling policy by winning on the merit. To party leaders interviewed by the author, regardless of legal victory, it mattered to the party to create political facts, raise criticism and questions regarding the policy and foster controversy in the public debate. In the case of judicial contestation by the party, the four Ds in Taylor's model were the aim: declare the PT´s opposition; delay policy´s implementation; discredit policies and, even if to a lesser extent, disable policy. As the author concludes, "courts can be effective political venues even when judicial review does not lead to legal victory" (p. 91).

As for OAB, the bar association was also one of the main opposition forces to the Cardoso administration and filed, with a higher success rate than other players, several ADINs against policies implemented in that period. Why did the OAB get involved in disputes against the Cardoso administration? Partly due to the ideals defended by the Association, which clashed with the neoliberal sense of the reforms promoted by Cardoso, but partly also because many of them hurt lawyers' pecuniary and professional interests. From the standpoint of a normative theory of democracy, it is troublesome that a professional organization has enfranchised its access to the country's main justice court, to call for constitutional control of laws to defend what it considers to be the nation's interest, and this when it is not simply about defending its own interests. Whichever the justification, such a situation contains a double paradox: if the organization is driven by its own interests, is it reasonable for it to enjoy privileged access to the constitutional court, whereas others do not? And if the organization is driven by others' interests, the situation is no less of a paradox, as what is a professional organization's mandate based upon for the defense of third party's interests, or even the country as a whole?

Supported by a "reservoir of public goodwill", says Taylor, the OAB has acted as a "democratic watchdog" and in the period analyzed in the book filed several suits against the Cardoso administration. The OAB was also a fierce opponent of topics in the Judiciary Reform, such as adoption of the Binding Precedent and reinforcing the STF as a constitutional court, always in defence of lawyers' interests. Although, in the comparison between the OAB and the PT, Taylor stresses that the former concentrated its suits with the STF whereas the latter put on a juridical guerrilla in the lower instances too, one aspect not mentioned by the author is the following: an ADIN by OAB against a government or Congress legal measure indicates, to the whole lawyers' community, a new type of case in

which they can act and bring individual suits in the Judiciary's first instance, making use of the diffuse side of the Brazilian hybrid judicial review system.

Lastly, Taylor applies his model comparatively, and the results are quite promising. On comparing the pension reforms in Brazil, Uruguay, Argentina and Mexico, as well as the level of opposition and judicial contestation raised in these cases, the elements of *policy salience* and *judicial institutional environment* are tested and confirmed. Taylor carries out a careful analysis of the political forces directly and indirectly engaged in the reforms in each country, examining particularly the level of unanimity *within* and *between* interest groups and political party with potential to act as veto players. From this analysis emerge descriptions of the fragmentation and inconsistency of the opposition to the reforms in the cases of Argentina and Mexico, and of greater articulation and consistency in the groups and opposition parties in Brazil and even more strongly in Uruguay. In the first two cases, the reform processes were relatively simple, whereas in the last two they were marked by tough resistance and only incremental advances. Two institutional variables played for the opposition to reform in Uruguay and Brazil: the *referendum* and judicial contestation, respectively.

Why did the courts not play the same role in Argentina, Mexico, and even in Uruguay? In the first two, it was the courts' lack of judicial independence in those countries that explains their absence in the pension reform policy, especially with regard to the external dimension, that is, the judges' independence from the other branches government. In Uruguay's case, judicial independence exists but the lack of abstract review and erga omnes effects caused the supreme court's decisions which were contrary to the reform to have very limited reach. In Uruguay, the most effective institutional mechanism was actually the referendum. In comparative terms, in the end the case of Brazil stood out for resorting to judicial contestation, which proved more effective due to greater independence by the Judiciary, form of access to the STF (standing) and the erga omnes reach of its decisions. The institutionalist explanation imposed itself and the comparison reinforced the pertinence of the variables in the model in *Judging policy*.

In conclusion, Taylor does not fail to indicate some ambiguities which surround the judicial review of public policies, such as the political use of courts by those who lose in the political arena – and which actions may raise the implementation costs to be borne by society as a whole – or even unequal access by groups to the constitutional court, generating distortions in the representation of interests and leading to particularistic decisions. But despite the criticism, the overall conclusion in *Judging policy* seems optimistic regarding the effects of judicial contestation in deepening democracy. While the majoritarianistic bias defends that a concentrated policymaking process makes politicians more accountable for the decisions they make and implement, Taylor argues, in line with Cox and McCubbins (2001), that a high and concentrated level of decisiveness may lead to such frequent changes

in public policies that the stability of good policies may be negatively affected. Besides, excluding other relevant actors lowers the level of commitment to the policies themselves. In a nutshell, a more decisive polity, a less resolute polity. The experience of veto points in Uruguay and Brazil, according to Taylor, would have "contributed to a more democratic reform process in these countries, founded in broader public evaluations of the costs and benefits of reform alternatives" (p. 149). In other words, "a high number of veto players may make policy less decisive and more resolute, but it does so both directly – by making any given policy more difficult to approve – and indirectly – by making the overall policy process slower and more deliberative" (p. 150).

It is interesting to note, lastly, that amid widespread expressions in the area of political studies of the Judiciary, such as "judicialization of politics" or "expansion of judicial power", Taylor chose to coin a new one: "judicial contestation". Partly, the expression makes sense because *Judging policy* does not analyze how the courts decide and distances itself, as we have seen, from models which are interested in explaining how judges behave and even from the idea that they act as veto players. His main concern is to show how the courts are activated externally by policy players interested in making judicial contestation an extension of political conflict. Though *Judging policy* does not adopt a pluralist perspective of democracy, it is irresistible to recall that the notion of public contestation is the core of Robert Dahl's definition of Poliarchy (limited, it is worth remembering, to political institutions) and if Taylor's effort, as well as that by all of us who have devoted ourselves to this study area, is to integrate the Judiciary into the roll of institutions which affect democratic processes, I think that the concept of *judicial contestation* is an excellent step to promote such integration, inserting the judicial institutions at the centre of the debate on how our polyarchies really work.

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